preceding bankruptcy, received payments which under some circumstances might operate as a preference in some views of the law, that that fact can be held to bar the proof of his claim, when, looking at all the transactions together, they demonstrate not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor, and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph 'a' of section 60. A result was reached under similar circumstances by the Circuit Court of Appeals for the Seventh circuit in *McKey* v. *Lee*, 45 C. C. A. 127, 105 Fed. 923, already referred to, by giving a construction to paragraph 'c' of section 60 beyond what its letter calls for; but we prefer to put the result on the broad ground that in the absence of positive and direct expressions, evidently intended to accomplish a particular purpose, the ordinary rules of construction require us to avoid interpreting this statute so as to effectuate so unreasonable a purpose. In this view, the decree of the court below should be reversed."

CONTEMPT—LIBELOUS PUBLICATION AFTER DECISION RENDERED.—The case of *Ex parte Lawrence and Canfield*, 34 Chicago Legal News, 132, decided Dec. 7, 1901, by the Circuit Court of Cook county, Illinois, presents certain remarkable facts and, we are inclined to think, certain equally remarkable law. It was an application for a writ of *habeas corpus* by the proprietor and editor of a Chicago newspaper to obtain their release from a sentence of thirty and forty days respectively in the county jail, imposed by a co-ordinate court for contempt of court.

The facts were briefly that relators had published a libelous article concerning and a cartoon of the Hon. Elbridge Hanecy, judge of the Circuit Court of Cook county, based upon a decision which he had rendered in a case of great popular interest. Judge Hanecy directed that an information be filed against the proprietor and editor for the alleged contempt, and in their answer thereto they acknowledged their responsibility for the publication and authorship of the offensive matter, but denied that they had intended "to influence, prejudice or terrorize the court with reference to its decision," for the specific reason that the case in question was decided on the day before the publication of the article. As a matter of fact, while Judge Hanecy had read a written opinion disposing of the legal questions involved in the case, and had in open court stated that "the order of August 9, 1901, is set aside and the petition and the information are dismissed," no formal order was entered on that day or before the publication of the article. The respondents in that court urged, however, that this was a final decision of the entire question—a complete determination of the entire controversy *quoad* that court—and they argued that they were therefore at liberty to comment on the decision in the manner charged.

Judge Dunne, also of the Circuit Court of Cook county, who issued the writ of *habeas corpus* to ascertain the legality of the convictions for contempt, affirms in a long opinion, first, his power to inquire into the jurisdiction of a co-ordinate court to enter a final order of commitment in a contempt case. He then rules (citing Black on Judgments, Vol. 1, sec. 106, and Freeman on Judgments, 2d ed. sec. 38), that the language used by Judge Hanecy in open court in dismissing the first cause, was equivalent to—indeed, *was* the final order in the proceeding,

though not entered by the clerk (the action of the clerk in such case being always merely ministerial), and that being so, under the doctrine of contempts as laid down in Illinois in the case of *Storey* v. *The People*, 79 Ill. 45, the relators had a right to comment upon and criticize the decision, "even to the extent of libeling the honored and respected judge who rendered the opinion, without exposing themselves to prosecution for contempt of court."

Judge Dunne bases his ruling upon certain cases decided by the Supreme Court of Illinois, construing its constitutional provision that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty," etc. He concludes his opinion as follows:

"*Public officials, executive, legislative and judicial, have always been and always will be subject to criticism because of their official acts. It is one of the incidents and burdens of a public life.*

"If the criticism be just it will commend itself to the public and be effective for good. If it be unjust and unfair it will fail to injure the man assailed.

"There is no good reason why a judge should have a different law applied to him than is applied to a president, a governor or a member of the legislature.

"Editorial lawyers, who gather their law from the circulation department or the counting room, have differed and will continue to differ with judges who obtain their law and inspiration from law books and legal precedents. But there is no good reason why, after the judge has given his exposition of the law and disposed of the case before him, such an editorial lawyer may not decide the same case to suit himself. It is only when he forestalls the judge with his opinion, and endeavors in his paper to coerce, intimidate, terrorize, wheedle or cajole the judge into agreeing with his newspaper law, that his conduct by any possible construction of the Illinois decisions, can become contempt of court.

"It is not without some reluctance that I feel constrained to differ so radically with the able and honorable jurist whose order has committed the relators to jail, because of the undeserved assault upon him, and because of my respect and friendship for him. But such considerations must give way before the vital principle involved in the protection of free speech and free press, a principle so important that it has been carefully and zealously guarded by the constitution of our State and the constitution of the United States, and the well considered decisions of our own Supreme Court.

"I am clearly of the opinion that the language used in open court by Judge Hanecy on October 28, 1901, amounted to a final order disposing of the case under consideration, and that being a final order, under the doctrine of "Contempts," as laid down in this State by our Supreme Court in *Storey* v. *The People*, that the relators had a right to comment and criticize that decision, even to the extent of libeling the honored and respected judge who rendered the opinion, without exposing themselves to prosecution for contempt of court."

The decision really went off upon the point that the first case was no longer pending, and while we confess that it and the legitimate deductions that may be made from it are somewhat startling, we must concede that there is a formidable array of authority for that view, and little, if any, *contra*. The following statement of the law is made in 7 Am. & Eng. Enc. Law (2d ed.), page 61:

"A slanderous and libelous publication concerning the judge, in relation to an act already done, or a decision rendered, cannot be punished by the court as a con-

tempt. However criminal the publication may be, it lacks that necessary ingredient to constitute a contempt, of tending to prejudice the cause or to impede its progress." Citing *Ex parte Barry*, 85 Cal. 603, 20 Am. St. Rep. 248; *Story* v. *People*, 79 Ill. 45, 22 Am. Rep. 158; *People* v. *Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Cheadle* v. *State*, 110 Ind. 301, 59 Am. Rep. 199; *State* v. *Dunham*, 6 Iowa, 245; *State* v. *Anderson*, 40 Iowa, 207; *Rosewater* v. *State*, 47 Neb. 630; *State* v. *Kiser*, 20 Oregon, 50; *Bayard* v. *Passmore*, 3 Yeates (Pa.), 438. But in *State* v. *Morrill*, 16 Ark. 384, the publication held to be a contempt was made after the determination of the cause.

We purpose examining in a later number the question from the standpoint of *Carter's Case*, 96 Va. 791, and from that of section 3768 of the Code of Virginia. While the point did not arise in *Carter's Case*, there are several expressions and quotations in the opinion of the court which are most significant in the foregoing connection. The question in regard to the provisions of the Code is whether they are a substitute for or only supplementary to the common law.

Since the foregoing note was prepared we have observed in the *National Corporation Reporter*, of Chicago, an interesting and extended criticism of the use made by Judge Hanecy in his opinion in the contempt case referred to, and by the Supreme Court of Virginia in *Carter* v. *Com.*, 96 Va. 806, of the quotation from Chief Justice Wilmot's celebrated opinion in *Rex* v. *Almon*. It appears that this opinion was never delivered by Wilmot, but was found among his papers after his death, and was published posthumously. An extract from the *Reporter's* article is appended:

"Whatever of evanescent fame accompanies the great judges of the world, there are some of their expressions which carry the element of immortality with them. This may be truly said of Wilmot's opinion in *Rex* v. *Almon*, written in 1765, and which was the *piece de resistance* in Judge Hanecy's opinion in the now famous contempt case leveled against Hearst's Chicago American and its employes. This opinion was published in 23 Nat. Corp. Rep. 426, to which reference is made. The citation made by Judge Hanecy was evidently copied from the opinion of the Court of Appeals of Virginia in *State* v. *Carter*, 96 Va 806.*

"The Virginia court's reference to the famous passage of Wilmot is to Volume 3 of Campbell's 'Lives of the Chief Justices,' where the extract will be found on page 190. Lord Campbell pointed out the fact of the non-delivery of Wilmot's opinion on page 189 as follows: 'I shall further only give a short extract from a judgment which he had written, but which was not delivered in a case, in which there was a summary application to the Court of King's Bench for an attachment against a bookseller (Almon) who had published a pamphlet reflecting severely on Lord Mansfield and other judges of the court, for their conduct in libel prosecution instituted by the Crown.'

"In examining the full judgment, as published in Wilmot's opinions (London, 1802), a note will be found (p. 243) as follows: 'This opinion was not delivered

* "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt committed in the face of the court; and the issuing of attachments by the Supreme Court of Justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law; it is as much *lex terrae* and within the exception of Magna Charta as the issuing of any other legal process, whatsoever; I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be found about it; it cannot, therefore, be said to evade the common law; it acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury; it is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other."

in Court, the prosecution having been dropped, in compliance, it is supposed, of the resignation of the then Attorney General Sir Fletcher Norton; but it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved.' . . . (p. 244). As these proceedings were afterwards dropped, they are not mentioned in the reports of this period, but it appears that this opinion was prepared after the argument on the rule to 'shew cause,' as it takes notice of the arguments of counsel and of the objection made to the granting of the attachment. But, as the matter never came to a final decision, it must be considered only as the opinion of the judge who gives it.'

"Lord Campbell (Volume 3, 'Lives of the Chief Justices of England') adds the following significant note on page 190: '*Rex* v. *Almon*, Wilmot Op. 243. In consequence of the resignation of Sir Fletcher Norton, who, as Attorney General, had made the motion, it was dropped, after cause shown, while the court was considering of its judgment; and, although there can be no doubt as to the power to proceed by attachment, in such a case—if a prosecution for libel on judges be necessary—the preferable course is to proceed by information or indictment, so as to avoid placing them in the invidious situation of deciding where they may be supposed to be parties.'

"It will thus appear that when the Supreme Court of Virginia, and Judge Elbridge Hanecy of the Cook Circuit Court, cited the extract from Wilmot's undelivered opinion in *Rex* v. *Almon*, it is most likely that the citation was ventured upon without the knowledge that they were quoting, not from a judgment of the court, but from an undelivered opinion written in 1765, when the King was supposed to be 'the fountain of every species of Justice which is administered in this Kingdom.' And as Chief Justice Wilmot further stated (p. 255): 'The King is 'de jure' to distribute justice to all his subjects, and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's Oath & Sit in the Seat of the King, concerning his Justice.'

"Just near the place where the Virginia Court of Appeals and Judge Hanecy stopped with their quotation, may be found another view of the judiciary, which, in the course of 136 years has lost somewhat of its regal glory. Wilmot continues to expatiate: 'The Arraignment of the Justice of the Judges is arraigning the King's Justice; it is an Impeachment of his wisdom and goodness in the choice of his Judges, and excites, in the minds of the People, a general Dissatisfaction with all Judicial Determinations, and indisposes their minds to obey them; and, whenever men's Allegiance to the Laws is so fundamentally shaken, it is the most fatal, and most dangerous obstruction of Justice, and, in my opinion, calls out for a more rapid and immediate Redress than any other Obstruction whatsoever, etc.'

"Lord Campbell was undoubtedly well aware of the entire text of the Wilmot opinion, but he did not hesitate, when writing the 'Lives of the Chief Justices,' to record his opinion that, in such cases, the preferable course is to proceed by information or indictment, so as to avoid placing the Judges in the 'invidious situation of deciding where they may be supposed to be parties.'

"This celebrated opinion of Lord Chief Justice Wilmot of the Court of Common Pleas has often been loosely cited in aid of modern contempt proceedings, which had an entirely different aspect.

"The occasion was as follows: Mr. J. Almon, the keeper of a bookshop, in Piccadilly, was charged with publishing a pamphlet containing alleged libelous passages upon the Court of King's Bench, and upon Lord Mansfield, the Chief Justice, charging him with having introduced a method of proceeding to deprive the subject of the King of the benefit of the Habeas Corpus Act. The Chief Justice was not even named in the pamphlet, which was entitled 'A Letter Concerning Libels, Warrants, Seizure of Papers, etc.,' printed for J. Almon, Piccadilly, 1765. This pamphlet was the basis for a motion by Attorney General Sir Fletcher Norton, made in the King's Bench, for an attachment against Mr. Almon, and a rule issued for contempt. One of the passages in the pamphlet was directed against Lord Mansfield's action in permitting an amendment of an information against the famous John Wilkes (1727–1797), and it was said therein that the amendment was made 'officiously, arbitrarily and illegally.' It is worthy to

record here, *en passant*, that notwithstanding this libel of Wilkes, it fell to the lot of Mansfield, three years later, to reverse the judgment of outlawry against Wilkes, on which occasion the Chief Justice spoke of 'that *mendax infamia* from the press, which, daily, coins false facts and false motives.' . . .

"These various extracts have been reproduced in order to show the general consensus of statement that Chief Justice Wilmot's opinion in *King* v. *Almon* was an undelivered paper and published only after his death. It is awarding to him an immortality which he never dreamed of when he penned his opinion, and it is somewhat of an anachronism to see it quoted as authority in some of the American courts at the close of the last and the beginning of the new century."

It is needless to say, however, that the decision in the Virginia case of *Carter* v. *Commonwealth* (96 Va. 791), is not at all dependent on the Wilmot opinion in *Rex* v. *Almon*, since in the Virginia case the contempt consisted, not in a libelous publication reflecting upon the court, but occurred in the face of the court, in the shape of a telegram by the defendant to his counsel, alleging his serious illness and consequent inability to be present at the trial of a case pending against him, with the intent that the telegram should be shown to the court and a continuance thereby obtained, and with the result that the telegram was used by his counsel (the latter acting in good faith) for that purpose.

FURTHER RULINGS IN BANKRUPTCY—*Amendment of Schedules.*—An amendment of schedules will not be allowed a bankrupt after his assets have vested in trustee, lest he may favor certain creditors as to whom he had waived his right of exemption. *Moran* v. *King*, 111 Fed. 730.

Compensation of Referee—Expenses—Powers.—Neither under the Bankrupt Act of 1898 nor under the General Orders of the Supreme Court is a referee permitted to charge a *per diem* in any case nor for any order he may enter. He may charge for actual expenses—such as blanks used in mailing notices, clerk hire in gross, i. e., uniform in each case, and not in proportion to amount of work done.

He cannot collect funds of the estate, nor can he issue subpœnas. *In Re Pierce*, 111 Fed. 516. See also *In Re Barker*, 111 Fed. 501.

A referee may in certain cases, however, award an injunction to a foreclosure sale. *In Re Matthews*, 109 Fed. 603—*ante*, p. 511. *In Re Grossman*, 111 Fed. 507, a referee was held entitled to a reasonable allowance for his services as special master in hearing objections to discharge of bankrupt. Citing *Fellows* v. *Freudenthal*, 102 Fed. 731.

Compensation of Assignees.—In *Wilbur* v. *Watson*, 111 Fed. 493, all compensation from estate of bankrupt was denied assignees under a general assignment which was itself an act of bankruptcy, for services rendered by them before petition was filed. Per *Brown*, J: "Such an assignment was constructively fraudulent and in violation of the Bankruptcy Act, in that it provided for a different mode of administration of the effects of the insolvent debtor than that contemplated by the Act." Citing *Bryan* v. *Bernheimer*, 181 U. S. 188; *West Co.* v *Lea*, 174 U. S. 590; *In Re Gutwillig*, 90 Fed. 475. "It seems to me that the broader view is that one who has voluntarily become a party to an arrangement which is contrary to the policy of Congress in enacting a uniform bankruptcy law should rather lose his time and effort, than the door should be opened to evasions of the Bankruptcy Act." See also *In Re Epstein*, 109 Fed. 878, *ante*, p. 510.

Powers of Bankrupt Court—Assessment Upon Unpaid Stock Subscriptions.—An important ruling is that *In Re Miller Electrical Maintenance Co.*, 111 Fed. 515, in